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NO. 91-722

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NL INDUSTRIES, INC.,
Petitioner,

v.

GHR ENERGY CORPORATION,
SOUTHERN STATES EXPLORATION, INC.,
and S.A. HOLDITCH & ASSOCIATES, INC.,
Respondents.

S. A. Holditch & Associates, Inc.'s Brief in Opposition to NL Industries, Inc.'s Petition for Writ of Certiorari to The United States Court of Appeals for The Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT

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LIST OF PARTIES

The parties to the proceedings below were petitioner NL Industries, Inc. and respondents GHR Energy Corporation, Southern States Exploration, Inc. and S. A. Holditch & Associates, Inc.

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BRIEF IN OPPOSITION FOR RESPONDENT

S. A. Holditch & Associates, Inc.'s Brief in Opposition to NL Industries, Inc.'s Petition for Writ of Certiorari to The United States Court of Appeals for The Fifth Circuit

Respondent S.A. Holditch & Associates, Inc., files this Brief in Opposition to NL Industries, Inc.'s Petition for Writ of Certiorari to urge that the writ, as to Issue III, not be granted because the judgment of the Fifth Circuit Court of Appeals on this issue is correct.

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 940 F.2d 957 and is reprinted in petitioner's appendix A. The opnions of the United States District Court for the

Southern Texas, Houston Division have not been reported and are reprinted in petitioner's appendices B and D.

JURISDICTION

Jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

By order of June 3, 1991, the Fifth Circuit affirmed in part and reversed in part the judgment of the district court and remanded for further proceedings. 932 F.2d 422. On June 17, 1991, NL Industries, Inc., filed a petition for rehearing and a suggestion for rehearing en banc. By unreported order of July 5, 1991, reprinted in petitioner's appendix F, both were denied. The Fifth Circuit then issued a corrected opinion on July 26, 1991. 934 F.2d 580. On September 10, 1991, the Fifth Circuit withdrew its corrected opinion and issued a third opinion. 940 F.2d 957. On November 1, 1991, NL Industries, Inc., filed a Petition for Writ of Certiorari pursuant to Sup. Ct. R. 13.2. This Brief in Opposition to the Petition for Writ of Certiorari is timely filed pursuant to Sup. Ct. R. 15.

STATEMENT OF THE CASE

Petitioner NL Industries, Inc., ("NL"), an oilfield supply and service company, and GHR Energy Corp. and Southern States Exploration, Inc., ("GHR"), an oil and gas producer, entered into an agreement dated April 9, 1985 (the "NL-GHR contract") under which NL agreed to perform certain workover and production enhancement procedures on a group of ten natural gas wells owned by GHR. (R.E. 182). At the request of GHR's secured bank lenders (the "Bank Group"), the NL- GHR

contract contained a provision requiring three engineering companies, including S.A. Holditch & Associates, Inc. ("Holditch"), jointly to certify to the Bank Group that the production enhancement procedures would increase the present value of the futue net revenues realized from the wells by more than the anticipated costs of the production enhancement procedures. (R.E. 189). Holditch is a professional engineering company that engages in petroleum engineering consulting services. Neither Holditch, nor the other two engineers, was a party to the NL-GHR contract. Also, none of these engineers certified, jointly or individually, to the Bank Group or to NL that the revenues from the workovers would exceed anticipated costs.

Article 4.3.i.1 of the NL-GHR contract provided that Holditch was to review and approve or, in its sole discretion, modify the fracture stimulation procedures proposed by GHR. In their contract, NL and GHR agreed that Holditch was to be the final and ultimate arbiter on the fracture stimulation procedures.[1] Specifically, the NL-GHR contract provided that "GHR and [NL] understand and agree that all decisions or modifications by Holditch of or with respect to any proposed fracture or other formation stimulation program submitted by GHR pursuant thereto shall be final and binding" upon NL and GHR. (R.E. 206-07). Holding that under Texas law, Hol-

1. Fracturing is a method of increasing the production of gas wells by injecting a propping agent, such as sand, into the formation from which the well produces under pressure in order to increase the permeability of the rock and thereby allow an increased flow of hydrocarbons. "Fracturing" is a "process of opening up underground channels in hydrocarbon-bearing formations, by force, rather than by a chemical action such as acidizing." *See* 8 H. Williams & C. Meyers, *Oil and Gas Law* 379 (1987).

ditch was an arbiter under the NL-GHR contract, the district court granted and summary judgment in favor of Holditch on the ground that Holditch's status as an arbiter precluded liability under the negligence theories asserted by petitioner in its First Amended Complaint. The Fifth Circuit affirmed.

REASONS FOR DENYING THE WRIT

I. Petitioner May Not Assert New Theories or New Issues on Appeal.

In its Petition for Writ of Certiorari, petitioner asserts for the first time that the opinions below, holding that it could not recover from Holditch for negligence because the NL-GHR contract designated Holditch as an arbiter, are in direct conflict with this Court's decision in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 147-48 (1968) (NL's Petition, Issue III, p. 18-19).

In section II, *supra*, Holditch will demonstrate that the *Commonwealth Coatings* rule cannot apply to Holditch. However, notwithstanding the inapplicability of this rule, petitioner's argument is untimely. Petitioner may not oppose summary judgment on appeal with new theories, new evidence, or new materials that were not presented to the trial court. *Savers Fed. Sav. & Loan Ass'n v. Reetz*, 888 F.2d 1497, 1501 (5th Cir. 1989); *John v. State of La. (Board of Trustees for State Colleges and Universities)*, 757 F.2d 698, 703, 710-11 (5th Cir. 1985); *Kriegesmann v. Barry-Wehmiller Co.*, 739 F.2 357, 358 (8th Cir.), *cert. denied*, 469 U.S. 1036 (1984). Petitioner did not raise this argument in the trial court, and in fact, petitioner's Reply Brief in the Fifth Circuit is the

first instance in which the petitioner even intimates the existence of this issue. NL's Reply Brief at 9.

An appellate court is constrained by the same standards as the trial court in reviewing a motion for summary judgment; that is, the appellate court must also "draw inferences most favorable to the party opposing the motion, and take care that no party will be improperly deprived of a trial of disputed factual issues." *John,* 757 F.2d at 708 (citing *United States Steel Corp. v. Darby,* 516 F.2d 961, 963 (5th Cir. 1975)). The party opposing summary judgment "must inform the trial judge of the reasons, legal or factual, why summary judgment should not be entered. If it does not do so, and loses the motion, it cannot raise such reasons on appeal." *Liberles v. County of Cook,* 709 F.2d 1122, 1126 (7th Cir. 1983). Recently, in *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986), this Court affirmed the rule that in a summary judgment proceeding the nonmovant must timely assert all arguments in the trial court, stating that there is no "express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim." *Id.* at 323. This Court places an affirmative duty on the nonmovant, petitioner here, to present any arguments or evidence that raises a genuine issue of a material fact which would defeat the entry of summary judgment in the trial court once the movant has met its burden of showing an absence of a genuine issue of material fact. *Id.* Although Petitioner filed affidavits concerning statements to this effect, it did not raise in the trial court its contention that its lack of knowledge of the prior business dealings between GHR and Holditch was a genuine issue of material fact which would bar entry of summary judgment

in favor of Holditch. Thus, petitioner is precluded from raising this argument for the first time in this Court.

The appellate court also must "examine the record as it existed at the time summary judgment was granted, without regard to facts or allegations not submitted to the trial court's scrutiny." *Penton v. Crown Zellerbach Corp.*, 699 F.2d 737, 741 (5th Cir. 1983). Although the meaning of "submitted to the trial court's scrutiny" was a previously disputed standard in the Fifth Circuit, in *Nissho-Iwai American Corp. v. Kline*, 845 F.2d 1300, 1307 (5th Cir. 1988) the Fifth Circuit definitively asserted that the trial court is not compelled to search the entire record for any semblance of a genuine issue of material fact before entering summary judgment. *Nissho-Iwai American Corp. v. Kline*, (cited with approval in *Savers Fed. Sav. & Loan Ass'n v. Reetz*, 888 F.2d 1497, 1501 (5th Cir. 1989))[2] Although neither of these cases expressly overruled *Higgenbotham v. Ochsner Found. Hosp.*, 607 F.2d 653, 656-57 ((5th Cir. 1979), and its progeny *(e.g. Nicholas Acoustics & Specialty Co. v. H & M Constr. Co.*, 695 F.2d 839, 845-47 (5th Cir. 1983) and *John*, 757 F.2d at 711), the trend in the Fifth Circuit and in other circuits is to require a trial court to base its rulng on a motion for summary judgment only on those matters specifically brought to the attention of the court. *Cookish v. Cunningham*, 787 F.2d

2. The Fifth Circuit previously held in *Higgenbotham v. Ochsner Found. Hosp.*, 607 F.2d 653, 656-57 (5th Cir. 1979), that where the record is not voluminous, the district court must consider the record as a whole, not simply those portions of the record relied upon by the moving party or specifically pointed out in opposition to the motion by the nonmoving party. However, as noted by the Fifth Circuit in *John*, the docket sheet in *Higgenbotham* showed that only five depositions were filed with the court. *John*, 757 F.2d at 711-12.

1, 6 (1st Cir. 1986) (holding that "an issue raised in the pleadings only was not 'presented' to the trial court, and cannot be argued on appeal"); *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985), *cert. denied*, 475 U.S. 1088 (1986); *Libertyville Datsun Sales, Inc. v. Nissan Motor Corp.*, 776 F.2d 735, 737 (7th Cir. 1985) (finding that it was the party's responsibility to "raise the *arguments* that it seeks to use . . . on appeal") (emphasis in original); *In re E. R. Fegert, Inc.*, 887 F.2d 955, 957 (9th Cir. 1989) (holding that the standard for whether an appellate court may consider an issue turns on whether the argument was "raised sufficiently for the trial court to rule on it"); *Cavic v. Pioneer Astro Indus., Inc.*, 825 F.2d 1421, 1425 (10th Cir. 1987) (holding that an appellate court could not consider an issue which was raised in the answer but not considered or ruled on by the district court); *In Re Pan American World Airways, Inc.*, 905 F.2d 1457, 1462 (11th Cir. 1990) (corollary of the rule that new issues may not be raised on appeal is that an issue must be clearly presented to the district court "in such a way as to afford the district court an opportunity to *recognize and rule on it*") (emphasis added).

The *Nicholas Acoustics* court also distinguished those cases in which the nonmovant raised "a distinct issue for the first time on appeal or introduced new material into the record on appeal" from cases in which the nonmovant failed "to point out to the district court support already in the record for the position that an issue is actually shown by the record to be in dispute." *Nicholas Acoustics*, 695 F.2d at 846 n. 7. Because petitioner never argued to the trial court that the prior business dealings between

GHR and Holditch were undisclosed and that this non-disclosure somehow harmed petitioner, petitioner is now foreclosed from attempting to raise that issue on appeal.

The *John* and *Nicholas Acoustics* courts also distinguished cases in which the record is relatively small from cases in which the record is voluminous and the evidence which purportedly demonstrates a disputed issue of material fact can be characterized "a needle in a paper haystack." *John*, 757 F.2d at 711; *Nicholas Acoustics*, 695 F.2d at 846-47 (examining the small record but noting that "it is foolhardy for counsel to rely on a court to find disputed issues of material fact not highlighted by counsel's paperwork" and that "practical constraints on the time of a judge make it impossible for the judge to examine a record of even moderate size"). *See also Local Union No. 59 v. Namco Electric, Inc.*, 653 F.2d 143, 146 (5th Cir. Unit A Aug. 1981) (holding that the appellate court can only review those "exhibits, depositions, and affidavits that were presented to, *and considered by*, the trial court") (emphasis added). As petitioner admitted in its Memorandum in Support of Motion for Leave to File Second Amended Complaint, this record is clearly voluminous and unwieldy. (R.E. 157-65). The record here is in excess of 1,000 pages, petitioner presented only two sentences in two separate affidavits alleging that it had no knowledge of the relationship between Holditch and GHR. Thus, even under the *Higgenbotham* reasoning, the trial court in this case was not presented with, and could not have considered, the issue whether summary judgment was precluded because of the prior business relationship between GHR and Holditch. More importantly, NL did not allege in its pleadings or argue in the trial court that such non-

disclosure constituted bad faith so as to warrant invalidation of Holditch's decisions as an arbiter. Therefore, thiis new argument is untimely.

II. The Fifth Circuit's Opinion is not in Conflict With Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968).

Petitioner argues that the opinions below which held that it could not recover from Holditch for negligence because the NL-GHR contract designated Holditch as an arbiter are in direct conflict with this Court's decision in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 147-48 (1968) (NL's Petition, Issue III, p. 18-19). Petitioner is wrong.

In *Commonwealth Coatings,* this Court applied the United States Arbitration Act and set aside an arbitration award on the ground that the third "neutral" arbitrator did not disclose his prior business relationship with one of the parties. *Commonwealth Coatings,* 393 U.S. at 147-50 (citing the United States Arbitration Act, 9 U. S.C. § 10, which delineates the grounds for vacating an arbitral award and § 18 of the Rules of the American Arbitration Association which requires disclosure by the arbitrator of "any circumstances likely to create a presumption of bias or which he believes might disqualify him as an impartial Arbitrator"). *Commonwealth Coatings* is clearly inapplicable here for three reasons. First, neither the United States Arbitration Act nor the Rules of the American Arbitration Association apply to this case. Petitioner and GHR did not arbitrate their disputes pursuant to the general arbitration clause in Article 6.7 of the NL-GHR contract. Additionally, Holditch is an

arbiter under the NL-GHR contract, not an arbitrator; thus, the provisions of the federal arbitration statute do not govern these facts. Second, the rule of *Commonwealth Coatings* requiring arbitrators to disclose "any dealings that might create an impression of possible bias" is by its terms applicable to arbitrators. However, decisions of arbiters such as Holditch are given effect in the absence of a clear and uncontroverted showing of bad faith, fraud, or failure to exercise an honest judgment. *United States v. Moorman,* 338 U.S. 457 (1950); *Cities Serv. Co., Inc. v. Derby & Co., Inc.*, 654 F. Supp. 492, 500 (S.D.N.Y.), *aff'd*, 835 F.2d 1429 (2d Cir. 1987); *City of San Antonio v. McKenzie Constr. Co.*, 150 S.W.2d 989, 996 (Tex. 1941); *see also, Huey v. Davis,* 556 S.W.2d 860, 864 (Tex. Civ. App.—Austin, 1977, writ ref'd n.r.e.) (contract regarding painting a 1978) (provision regarding performance of contract for the construction of residential dwelling); *Austin Bridge Co. v. State,* 550 S.W.2d 135, (Tex. Civ. App.—Waco 1977, writ ref'd nflrflefl) (contract regarding painting a bridge); *Plantation Foods, Inc. v. R.J. Reagan Co.*, 520 S.W.2d 432, 434-35 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.) (agreement allowing architect to determine cause of roof problems); *Hooks v. Cook,* 345 S.W. 2d 592, 594-95 (Tex. Civ. App.—Houston 1961, writ ref'd n.r.e.) (agreement to be bound by surveyor's determination of acreage); *Goodrum v. State,* 158 S.W.2d 81, 86-87 (Tex. Civ. App.—Galveston 1942, writ ref'd w.o.m.) (provision making architect the judge of proper performance of contract). Even assuming that the prior business relationship between GHR and Holditch was unknown to Petitioner at the- time it entered into the NL-GHR contract with GHR, the *Commonwealth Coat-*

ings rule does not apply to Holditch in his role as an arbiter. In affirming summary judgment in favor of Holditch, the Fifth Circuit unequivocally held that Petitioner could not prove bad faith or egregious misconduct on the part of Holditch as its complaint merely alleged a negligence cause of action against Holditch. Third, unlike the facts of this case, petitioner in *Commonwealth Coatings* challenged the arbitration award on this ground in the district court. NL failed to bring this issue to the attention of the district court.

GHR filed a moion to compel arbitration pursuant to Article 6.7 of the NL-GHR contract. (R. 490). NL opposed this motion. However, the district court did not order arbitration and the parties litigated their disputes in federal court; therefore, the provisions of the United States Arbitration Act and the holding of *Commonwealth Coatings* are completely inapplicable to this case. Even if NL and GHR had submitted their disputes to arbitration in accordance with the NL-GHR contract, Holditch would merely have been an arbiter, and not an arbitrator. Thus, any potential bias within the meaning of *Commonwealth Coatings* which NL now argues Holditch might have by virtue of its prior business dealings with GHR is wholly irrelevant.

Arbitration is both contractural and consensual. *Peerless Importers, Inc. v. Wine, Liquor & Distillery Workers Union Local One,* 903 F.2d 924, 927 (2d Cir. 1990) (citing *AT & T Technologies, Inc. v. Communications Workers of Am.,* 475 U.S. 643, 648 (1986)); *Neal v. Hardee's Food Sys., Inc.,* 918 F.2d 34, 37 (5th Cir. 1990); *United Paperworkers Int'l Union v. Int'l Paper Co.,* 920 F.2d 852, 855 (11th Cir. 1991). The task

of an arbitrator is contract interpretation. *Lancaster v. Norfolk & Western Ry. Co.*, 773 F.2d 807, 814 (7th Cir. 1985), *cert. denied*, 480 U.S. 945 (1987) (citing *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)). In contrast, an engineer or architect who issues a certificate of compliance under a contract performs a much more narrow function. Engineers and architects are not typically expressly designated as arbitrators charged with the task of contractual interpretation; rather, their decisions are generally only binding with respect to compliance with specifications, materials, and artistic effects under the contract. *United Pacific Ins. Co. v. County of Flathead*, 499 F.2d 1235, 1237 (9th Cir. 1974) (decisions of architects or engineers regarding performance of contractual specifications are binding in the absence of fraud or bad faith); *Marceron v. Chevy Chase Services, Inc.*, 258 F.2d 155, 158 (D.C. Cir. 1958) (distinguishing the function of appraisers (fixing fair market value) from the function of arbitrators (private judges with contractual powers)); *John W. Johnson, Inc., v. J. A. Jones Constr. Co.*, 369 F. Supp. 484, 489 (E.D. Va. 1973). These engineers and architects are generally known as contractually-designated arbiters. Holditch is an arbiter rather than an arbitrator under the NL-GHR contract.

NL and GHR expressly agreed in Article 6.7, the arbitration clause, of the NL-GHR contract that "[a]ny controversy or claim arising out of or relating to this contract, or the breach thereof" would be settled by arbitration "in accordance with the Commercial Arbitration Rules of the American Arbitration Association." Even NL acknowledges in its Fifth Circuit brief that only a narrow reading of Article 4.3.i.1 (providing for Holditch

to review and modify GHR's frac designs) "confining 'finality' to questions of pre-workover design, can be harmonized with the presence of the general arbitration clause." Petitioner's Brief for the Fifth Circuit at 31. NL and GHR clearly did not intend to and did not designate Holditch as an arbitrator under the NL-GHR contract. Holditch's duties under the NL-GHR contract were limited to reviewing and approving or modifying the proposed fracture designs. Holditch's decisions or modifications *"of or with respect to any proposed fracture or other formation stimulation program submitted by GHR"* are *"final and binding upon the Parties."* NL-GHR contract, Article 4.3.i.l. (emphasis added). Thus, Holditch's limited duties imposed upon it under the NL-GHR contract did not in any way encompass contractual interpretation, the province of an arbitrator pursuant to the Article 6.7 arbitration clause.

In *Federated Dep't. Stores, Inc. v. J.V.B. Indus.*, 894 F.2d 862, 867 (6th Cir. 1990), the court reconciled similar provisions in a construction contract by ruling that the architects could only resolve discrepancies, inconsistencies and conflicts with respect to his own drawings and specifications prepared in accordance with the contract. The court held that the arbitrators' decision that the architect could only resolve discrepancies relating to artistic effects was "inescapable in light of the broad arbitration clause in the contracts, which subjects all claims arising out of the contract to arbitration." *Id.* Thus, because the broad arbitration clause in Article 6.7 of the NL-GHR contract also stipulates that disputes and claims arising out of the contract should be submitted to arbitration, Holditch's role is clearly limited to that of a contractually-designated arbiter whose decisions are only bind-

ing with respect to the factual task of reviewing and modifying the designs of the production enhancement procedures.

Because Holditch is an arbiter as opposed to an arbitrator, *Commonwealth Coatings* does not dictate that Holditch's decisions under the NL-GHR contract be set aside on the ground that Holditch and/or GHR failed to disclose their ongoing business relationship to NL. *See Fuller v. Highway Truck Drivers and Helpers Local 107*, 428 F.2d 503, 508 (3d Cir. 1970) (distinguishing *Commonwealth Coatings* from a union committee decision in that *Commonwealth Coatings* involved an "arbitrator whose activities and relationships gave rise to the impression of bias . . . [and who] was in a position to directly influence the decision by participating in the deliberations of the arbitrating panel and by casting his vote").

Further, the scope of the *Commonwealth Coatings* rule as applied to true arbitrators has been criticized and circumscribed by various courts. *Toyota of Berkley v. Automobile Salesman's Union, Local 1095*, 834 F.2d 751, 755 (9th Cir. 1987), *cert. denied*, 486 U.S. 1043 (1988) (adopting Justice White's concurrence in *Commonwealth Coatings* that arbitrators, "who are often effective because of their connections to the marketplace, should not be disqualified automatically by a business relationship with the parties if it is fully disclosed or trivial"); *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681-82 (7th Cir.), *cert. denied*, 464 U.S. 1009 (1983) (noting that *Commonwealth Coatings* was not a clear majority decision and citing Justice White's concurrence for the proposition that arbitrators are not held

to the same ethical standards as Article III judges); *Ormsbee Dev. Co. v. Grace,* 668 F.2d 1140, 1150 (10th Cir.), *cert. denied,* 459 U.S. 838 (1982) (holding that evidence of impropriety on the part of an arbitrator must be "direct, definite, and capable of demonstration"); *Cook Indus., Inc. v. Itoh & Co. (America) Inc.,* 449 F.2d 106, 108 (2d Cir. 1971), *cert. denied,* 405 U.S. 921 (1972) (holding that the duty of arbitrators to disclose a pecuniary interest is limited to disclosure of "dealings of which the parties cannot reasonably be expected to be aware, i.e., dealings 'not in the ordinary course of . . . business' "). *Commonwealth Coatings* is simply inapplicable to this case and is not a proper basis for the granting of the Petition for Writ of Certiorari.

CONCLUSION

For the foregoing reasons, S.A. Holditch & Associates, Inc. respectfully requests that the Court deny the Petition for Writ of Certiorari as to Issue III.

Respectfully submitted,

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